

USCIB Taxation Committee
Summary of Comments from Members Concerning APA Program

In Preparation for Hearing – February 22, 2005

February 21, 2005

The U.S. Council for International Business (USCIB) works to advance the global interests of US business in the United States and abroad. It is the US affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE).

The membership of the USCIB welcomes the opportunity to express support for and comment on the APA program. The membership uniformly endorses the APA program. We value the possibilities it affords to achieve relative certainty in complex situations, reduce litigation, and influence all taxing authorities toward fair and administrable outcomes.

Accessibility and Efficiency of the Program

Administrative burden

We appreciate the need for thorough fact gathering and accept that requests for extensive information and analysis are a necessary part of the process. Especially early on, generalized requests are expected. After all, no government's tax authorities can possibly understand the business and economics of an APA applicant as thoroughly as that particular taxpayer does. However, our experience has been that excesses sometimes occur. We encourage steps to assure that requests are focused and reflect all information included with the taxpayer's submission.

One point to consider is the possibility of introducing an appeal process where information requests are perceived to be truly excessive or out of bounds. We do not seek to encourage dispute and would not expect such a process to be frequently invoked. But the mere existence of such a process could help check any tendencies to excess.

Broader appeals process

In fact, as a broader point, we suggest consideration of a process which permits taxpayers to seek, subject to mutual agreement, to refer their APA matter to Appeals for expedited consideration. It is well known that some particularly complex APA matters have become bogged down and have taken extended periods of time to resolve. Delays defeat the purpose of enabling taxpayers to conduct business with confidence as to taxation; even the perceived chance of delay or contentiousness can discourage taxpayer participation in the program.

Obviously, the shifting of an entire APA matter to Appeals should be voluntary from both sides. It may be more appropriate for particularly difficult or time-sensitive situations; however, for the right circumstances, we recommend its serious consideration.

APA teams

It is the observation of our members that the APA team's size and composition meaningfully influence the effectiveness and time to conclude the process, as does the clarity of lines of decision-making within the team.

We acknowledge the value of the APA program as a training ground for professionals at the Service. Controls should be in place to assure that regular communication flows, scheduling of meetings and other matters are not slowed or hampered due to team participation motivated by training.

Personnel turnover on APA teams can significantly hamper progress. Incentives and practices which aim at keeping the team members in place through resolution, especially at the decision-making levels, are constructive.

Communications

The inability of the Service's APA teams to travel is a major impediment. It places additional costs on the taxpayer, creates delays and harms the effectiveness of communications.

This is exacerbated to the extent key APA team members are not able to freely and regularly engage in negotiations by telephone.

This is a matter of the size and organization of teams. Limits on the number of people involved with a particular matter and those individuals' other responsibilities, along with an organization matrix that permits individuals or small groups to advance substantive communications are ingredients to a more expeditious process.

A final point on communications also involves the Competent Authority. It is our membership's observation that measured early involvement of the Competent Authority, followed by a consistent ongoing linkage, is an important ingredient to effective processes in the context of bi- and multi-lateral APAs.

Fairness based on taxpayer domicile

There is some perception in the business community that the program is not available on the same terms to inbound taxpayers. For example, it is felt that a methodology that presents a more limited-risk, limited-return profile is much more acceptable and therefore much more likely to be concluded timely where the such tested party is the foreign subsidiary of a US parent, than where it is the US subsidiary of a foreign parent. Of course, the same observation could probably be made of APA programs based in other countries as well.

This is a very important point, both in respect of the accessibility of the program to multinationals based outside the United States and in respect of the ability of US-based taxpayers to negotiate fairly with foreign governments.

The US government did the right thing when it set the example of adopting the program and encouraged its peers to act similarly. As you know, many governments and the OECD, through its 1995 transfer pricing guidelines, responded in kind. However, the system may face the danger of imploding if all governments do not perceive their counterparts as negotiating fairly. US leadership through fairness is the first ingredient to maintaining pressure on non-US governments to treat US based multinationals (and other investors) fairly.

Confidentiality and Transparency

We recognize the Service's good intentions and success in preserving taxpayer confidentiality. We would be remiss if we did not take the opportunity to emphasize how essential this is to maintaining a viable program.

We do suggest that, while confidentiality is paramount, steps towards increasing transparency are welcome and will enhance accessibility of the program and overall effectiveness of our regulatory regime for transfer pricing. Transparency de-mystifies the process and strengthens the perception of fairness.

Some willingness to publish guidelines on appropriate pricing methods for different situations, or even comparables ranges for categories of transactions – e.g., routine distribution or services – would be welcome. It is a complex world, and the resources devoted to analysis of transfer pricing continues to grow. We should all look out for opportunities to keep such growth in check.

APA Outcomes

Critical assumptions

Our members recognize the need for a mechanism to respond to significant changes in facts. They are wary of “critical assumptions” that might prompt a revision or even a cancellation of an APA. Termination of an APA leaves the taxpayer in a very uncertain position. What we would encourage is consideration of intermediate remedies, or mechanisms to adjust the APA in response to changing circumstances. For example:

- Predetermined adjustments to accommodate specified types of changes in economic conditions might be feasible;
- More broadly, an expedited process to renegotiate elements of the agreement in response to new circumstances could provide a very useful alternative to abandonment.

Moving Ranges

A specific question the Service has asked concerns the acceptability of incorporation in APAs of comparables ranges which are not fixed. Our membership has mixed views on this. It may be appropriate in the right circumstances, but it also introduces uncertainty and could add compliance burdens for taxpayers. We encourage the Service that when it develops a more fully

articulated proposal in this regard, to publicize it for comment and we will gladly provide further input.

Impact of APA on taxpayer relationship with related party

The Service has sought input on the feasibility of reflecting in the APA analysis the impact of execution on the related party relationship. We do not believe this is meaningful; we believe that any analysis should reflect the relationship as it exists in substance and documented through inter-company agreements.

Closing

Again, our membership appreciates and strongly supports the APA program. Because it is voluntary, the possibility of no resolution removes a potential source of discipline to the process, and any perception of inefficiency or uncontained burden can discourage participation. We have offered some broad suggestions in relation to the effects of organization of teams and how communications with taxpayers are conducted. We endorse introduction of mechanisms to appeal, whether with respect to information requests, particularly contentious issues, or an entire APA matter. We expect that the presence of outlets such as this, even if not invoked, would make the process move more vigorously.

We urge that a top priority should be to promote fair and consistent application of the program to taxpayers with no regard to domicile. A perception to the contrary on the part of non-US taxpayers will undermine the power of the program as a key part of fostering international cooperation and fair allocation of tax burdens.

In fact, we consider this initiative in a broader international context. As you know, the OECD has an ongoing and active process seeking to improve the effectiveness of the Mutual Agreement Procedure. The success of this work is very important to US business and to our trading partners, and we strongly endorse it. We must continue to work towards expedited resolution of disputes and binding arbitration among governments – without which uncertainty, wasted resources and inequitable outcomes will continue, indeed increase.

Your commitment to improving accessibility and fairness of the APA program is similar in spirit. We commend the Service's efforts to this end and we hope they can be carried forward part and parcel with the broader initiative to achieve a fairer, less contentious international environment.